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## **Subpanel Chairman Eyes Legislation to Limit OIRA Influence Over Agencies**

By Geof Koss

Rep. Brad Miller (D-N.C.), who chairs the House Science and Technology subcommittee on investigations and oversight, is considering legislation to limit the impact of a controversial executive order that critics say gives the White House unprecedented ability to shape policy at regulatory agencies throughout the federal government.

During an oversight hearing this morning, Miller criticized Executive Order 13422, released by the Bush administration earlier this year, saying ***"there are many potential hazards on this path."***

The Bush order amends an earlier Clinton administration order to make agency guidance documents — which are nonbinding but intended to assist with regulatory compliance — subject to review by the White House Office of Information and Regulatory Affairs. OIRA is an influential unit within the Office of Management and Budget that already plays a significant role in overseeing the federal regulatory apparatus.

The office was spotlighted earlier this month when President Bush used a recess appointment to install Susan Dudley — the former head of the anti-regulatory Mercatus Institute — as its head. That prompted an outcry from Democratic Senators.

Critics call the order the latest in a string of administration efforts to expand the influence of OIRA in federal policymaking.

"Critics of OIRA's role since 2001 describe a process whereby the values and judgments of OIRA's small staff (dominated by economists) trump the judgments of technical experts in the agencies and supplant the values in statute designed to guide agency regulatory activities," said a Democratic memo distributed at the hearing. "The cumulative effect of OIRA's behavior since 2001 has been to intimidate agencies into running away from pursuing their statutory responsibilities rather than get caught up in the political struggles associated with moving regulation forward."

Miller called Bush's order ***"a new chapter in OIRA's role,"*** saying it appears to create a new regulatory hurdle by requiring agencies to demonstrate "market failure" before issuing regulations.

***"Market failure does not appear in any statute as a consideration in rule-making,"*** he said. ***"In fact, Congress flatly rejected the argument that the market will solve the problem when Congress enacted the legislation granting rule-making authority."***

Miller also criticized provisions creating within each federal agency a ***"regulatory policy officer"*** who can ***"smother regulatory efforts in the crib before considering a regulatory action."***

***"The cumulative effect of all these changes is to seize for the president and OIRA power over regulatory efforts consistent neither with statute nor with the Constitution,"*** he said.

Steven Aitken, who was OIRA's acting administrator before Dudley's appointment, defended the order for creating the opportunity for an OIRA review and noted that federal agencies are not required to submit all guidance for review.

He also maintained that the concept of "market failure" dates back to the Clinton administration's policies for OMB, and sought to allay concerns over the role of regulatory policy officers, who he noted are still subject to the head of their respective agencies.

However, Gary Bass, of the watchdog group OMB Watch, urged lawmakers to "find a way to overturn the executive order. If that is not possible, we urge Congress to use its power of the purse to limit appropriations to implement some of all of the changes required" by the order.

According to the committee's memo, Miller is "actively considering" such a bill.

"One possible response is to offer legislative language that will enhance the transparency of the actions by the regulatory policy offers," the memo states.

However, Peter Strauss of Columbia Law School said that appropriations language forbidding funds for implementation of the order may be more practical than a bill, which be easier for the president to veto.

Miller and Aitken also tussled over Aitken's refusal to discuss internal White House deliberations over development of the memo, which he said were privileged.

Miller disputed that. ***"I urge you to look at your law books this afternoon, and I assure you will be asking for more documents,"*** he said.

To that, Rep. Dana Rohrabacher (R-Calif.) suggested the committee consider the Clinton administration's role in shaping its OIRA policies as well.

"We may have to request those documents as well, Mr. Chairman," he said.